No. 85-241

(2)

Supreme Court, U.S.
FILED
OCT 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

ALAN MCSURELY AND MARGARET MCSURELY,
PETITIONERS

v.

JOHN K. MCCLELLAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

BARBARA L. HERWIG
MARC JOHNSTON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

18pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioners' First Amendment claims must be dismissed on the independent grounds that petitioners failed to produce evidence supporting those claims and that the claims are barred by the Speech or Debate Clause.

2. Whether the court of appeals correctly held that petitioners' Fourth Amendment claims are barred by qualified immunity under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

3. Whether the court of appeals correctly held that certain of petitioners' common law privacy claims must be dismissed on the ground that petitioners failed to produce evidence supporting those claims.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 8

Conclusion 13

TABLE OF AUTHORITIES

Cases:

Barr v. *Matteo*, 360 U.S. 564 11

Black v. *Cutter Laboratories*, 351 U.S. 292 8

Davis v. *Scherer*, No. 83-490 (June 28, 1984) 12

Doe v. *McMillan*, 412 U.S. 306 ..... 10, 13

Dombrowski v. *Eastland*, 387 U.S. 82 10

Eastland v. *United States Servicemen's Fund*, 421 U.S. 491 10

Gravel v. *United States*, 408 U.S. 606 10

Harlow v. *Fitzgerald*, 457 U.S. 800 ..... 7, 11, 12

Mitchell v. *Forsyth*, No. 84-335 (June 19, 1985) 11

United States v. *Johnson*, 383 U.S. 169 7

Page

Constitution:

U.S. Const. :

Art. 1, § 6, Cl. 1 (Speech or Debate Clause) 4, 7, 8, 9, 10, 13

Amend. I 6, 7, 8, 9

Amend. IV 5, 6, 7, 11

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-241

ALAN MCSURELY AND MARGARET MCSURELY,
PETITIONERS

v.

JOHN K. MCCLELLAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-57a) is reported at 753 F.2d 88. Earlier opinions of the court of appeals are reported at 697 F.2d 309, 553 F.2d 1277, 521 F.2d 1024, and 426 F.2d 664.

JURISDICTION

The judgment of the court of appeals (Pet. App. 58a-59a) was entered on January 18, 1985, and a petition for rehearing was denied on March 19, 1985 (Pet. App. 60a). On June 11, 1985, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 16, 1985, and the petition was filed on August 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. On August 11, 1967, local law enforcement officials of Pike County, Kentucky, arrested petitioners on charges of violating Kentucky's anti-sedition statute. In the course of executing a search warrant, the officials seized a large quantity of petitioners' personal papers and belongings. Five days after their arrest, petitioners filed suit in the United States District Court for the Eastern District of Kentucky, seeking to have the anti-sedition statute declared unconstitutional. Pet. App. 4a-5a. Petitioners requested the three-judge court to place the materials seized from them under seal or in the custody of the United States Marshal. At a conference in chambers, they agreed that the materials would " 'be kept in the custody of' " Thomas Ratliff, the local prosecutor (*id.* at 5a). On September 14, 1967, the court declared the Kentucky statute unconstitutional. It ordered that the materials in Ratliff's custody " 'continue to be held by him in safe keeping until final disposition of this case by appeal or otherwise' " (*id.* at 5a-6a).

b. On the day following petitioners' arrest, Ratliff announced that he intended to make the seized materials available to congressional committees (Pet. App. 4a). In September 1967, a staff member of the Permanent Subcommittee on Investigations of the Senate Government Operations Committee, which was authorized to " 'investigat[e] into the causes of civil and criminal disorder that were racking the nation during this period' " (*id.* at 33a n.17), was advised that the materials in Ratliff's custody included "information regarding efforts to organize young people 'to engage in violence and demonstrations' " (*id.* at 6a). Arrangements were made for a Subcommittee representative to travel to Kentucky to inspect the documents.

John Brick, a Subcommittee investigator, examined the materials on October 8, 1967, pursuant to directions from the Subcommittee's general counsel, Jerome Adlerman.

Brick took copies of 234 of the documents back to Washington. Once there, he conferred with Adlerman and the Subcommittee's chairman, Senator John L. McClellan. Adlerman and McClellan agreed that Brick should return to Kentucky to inspect more of the documents in Ratliff's custody, which Brick did the following week, taking notes on what he examined. Pet. App. 6a-7a.

c. Brick then prepared congressional subpoenas for Senator McClellan's signature. On October 18, 1967, he served these subpoenas on petitioners and, because the documents were not in their possession, on Ratliff and the United States Marshal as well. Pet. App. 7a. Petitioners immediately filed a motion before the three-judge court to restrain Ratliff and the Marshal from complying with the subpoenas. After several months of litigation, the court of appeals directed that the documents in Ratliff's custody be returned to petitioners, " 'without prejudice to the right of the Senate Committee to proceed with the enforcement of the subpoenas against [petitioners].' " *Id.* at 7a-8a, 55a-56a; 398 F.2d 817 (6th Cir. 1968).[1]

d. On November 8, 1968, Brick traveled again to Kentucky to serve new subpoenas on petitioners. At the same time, he returned the 234 copies of documents that had been in the Subcommittee's possession, and local authorities returned the original materials that had been in Ratliff's custody. Petitioner Alan McSurely testified that Brick instructed him to read through each of the copies as Brick returned them. Petitioners destroyed the originals and copies the same day that they were returned. On March 4, 1969, they appeared before the Subcommittee and refused to produce the subpoenaed documents. Pet. App. 8a-9a.

---

[1]This Court twice stayed orders of the district court directing compliance with the subpoenas. 389 U.S. 949 (1967); 390 U.S. 412, 914 (1968).

2. The foregoing events were the beginning of a "seventeen-year odyssey through the courts" (Pet. App. 2a). On the same day that petitioners appeared before the Subcommittee in 1969, they filed this action in the United States District Court for the District of Columbia. As subsequently amended, the complaint alleged various constitutional violations and sought, inter alia, compensatory and punitive damages from Ratliff, as well as from Senator McClellan, Adlerman, and Brick, the decedents of respondents. See *id.* at 9a-10a; 553 F.2d 1277, 1284 (1976).[2]

The Senate defendants moved for summary judgment on the ground that they were entitled to immunity under the Speech or Debate Clause. On appeal following the district court's denial of the motion, a divided panel of the court of appeals held that most of petitioners' claims were barred. 521 F.2d 1024 (1975). The full court agreed to rehear the case. See Pet. App. 10a-11a.

Sitting en banc, the court of appeals unanimously agreed that the Senate defendants were entitled to dismissal of those claims that rested on "the alleged use made of the documents within Congress, since such use is protected by the Speech or Debate Clause" (553 F.2d at 1280). The court also unanimously ordered dismissal of petitioners' claim against the Senate defendants "relating to the original taking of [their] books and papers by the Kentucky authorities" (*ibid.*) because petitioners "fail[ed] specifically to

---

[2]Petitioners also named another Subcommittee staff member, Donald O'Donnell, as a defendant. At trial, the district court entered a directed verdict against petitioners on their claims against O'Donnell, and they did not appeal this ruling (Pet. App. 13a). Senator McClellan, Adlerman, and Brick, with or without O'Donnell as appropriate, are referred to as the "Senate defendants." For convenience, we will use the defendants' names to refer to their successors as well. See note 5, *infra*.

allege that any of the federal defendants promoted or participated in the Kentucky raid" (*id.* at 1288 (footnote omitted); *id.* at 1303 n.2 (Wilkey, J., dissenting)). See Pet. App. 11a.[3]

By an equally divided vote, however, the court of appeals affirmed the district court's denial of summary judgment with respect to petitioners' allegations "concerning the action of subcommittee investigator Brick in inspecting the documents and transporting copies of some of them to Washington prior to issuance of a subcommittee subpoena" (553 F.2d at 1280). Five judges thought that these allegations could be sufficient to state a claim, outside the defendants' speech or debate immunity, that the defendants had violated the Fourth Amendment by gaining access to the documents in Ratliff's custody contrary to the three-judge court's 1967 safekeeping order (*id.* at 1289 (opinion of Leventhal, J.); see page 2, *supra*). The other five judges thought that Brick's actions "could never, on all logic and precedent, be held an 'unreasonable search and seizure' within the Fourth Amendment" because, once the documents had originally been seized by Kentucky authorities, Brick's inspection of them "work[ed] no new Fourth Amendment wrong" (553 F.2d at 1305, 1318 (Wilkey, J., dissenting)).[4]

This Court granted the Senate defendants' petition for a writ of certiorari (434 U.S. 888 (1977)), but dismissed the writ as improvidently granted (438 U.S. 189 (1978)).

---

[3]The court of appeals upheld the district court's ruling that petitioners' claim relating to the dissemination of documents outside Congress was not barred. At trial, however, the district court directed a verdict against petitioners on this claim, from which petitioners did not appeal. Pet. App. 11a, 13a.

[4]Judge Danaher, joined by three other judges, wrote separately that the Senate defendants were entitled to absolute immunity in all respects because "the Subcommittee and the Senate itself, had ratified [their] actions" (553 F.2d at 1339 n.14).

3. Following several years of discovery, the case went to trial in 1982.[5] During the trial, the district court permitted petitioners to amend their complaint to add a claim that the defendants had violated their common law right of privacy (see Pet. App. 13a; 1 C.A. App. 337). In special verdicts, the jury assessed a total of $1.6 million in damages, most of it against Ratliff. The awards against the Senate defendants totalled $169,000 for violation of the First Amendment, a like amount for violation of the Fourth Amendment, and $71,000 for violation of the right to privacy. Pet. App. 13a, 19a-20a n.7, 26a n.12, 36a n.19.

4. The court of appeals reversed the judgments against the Senate defendants except with respect to the $21,000 awarded against Brick on privacy grounds (Pet. App. 1a-57a).[6] The court of appeals held that petitioners' First Amendment claims must be dismissed on two grounds, "each independently sufficient" (*id.* at 26a). First, the "proof at trial * * * did not bear out [petitioners'] allegations that the Senate defendants acted * * * to chill" their First Amendment rights, because petitioners "produced no evidence suggesting that the real purpose of the Subcommittee investigation was curtailment of their political

---

[5]While the interlocutory appeal was pending, Brick and Adlerman died. After the petition for a writ of certiorari was filed in 1977, Senator McClellan also died. This Court granted a motion to substitute the Senator's estate (434 U.S. 1043 (1978)). On remand, the district court granted a motion filed by petitioners to substitute the widows of Brick and Adlerman over the objections that the motions were untimely and that the widows were not proper parties because they were not legal representatives of their husbands' estates. When Adlerman's widow subsequently died, the district court substituted her estate, again over objection. The court of appeals upheld these substitutions (Pet. App. 15a-19a).

[6]Ratliff's appeal was dismissed following conclusion of a settlement agreement (Pet. App. 3a). On behalf of Brick's successor (see note 5, *supra*), we have filed a conditional cross-petition for a writ of certiorari (No. 85-420).

activities" (*id.* at 27a). Rather, petitioners' evidence showed only that Senator McClellan may have investigated them as part of a private feud with columnist Drew Pearson, petitioner Margaret McSurely's former lover (*id.* at 28a). Such a motive, however, was irrelevant to their allegation of a First Amendment violation (*id.* at 29a). To illustrate the "mismatch between the first amendment claims [petitioners] pleaded * * * and the proof offered at trial" (*id.* at 29a-30a), the court of appeals noted the confusion in the record with respect to whether the jury had even been instructed that there were First Amendment claims against the Senate defendants (*id.* at 30a-32a).

Even if petitioners had proven a violation of the First Amendment, the court of appeals stated that the Senate defendants would be entitled to immunity under the Speech or Debate Clause (Pet. App. 32a). The court reasoned that the Subcommittee "unquestionably had authority to investigate * * * [petitioners'] involvement in" a race riot in 1967 (*id.* at 33a), and that petitioners' allegations concerning the Subcommittee's motives were " 'precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry' " (*id.* at 34a (quoting *United States* v. *Johnson,* 383 U.S. 169, 180 (1966)). Because the court found that the Subcommittee was, at a minimum, apparently undertaking legitimate investigative activity, it concluded that it could not "press on and inquire into" whether that activity was improperly motivated (Pet. App. 34a).

The court of appeals held that petitioners' Fourth Amendment claims were barred by the Senate defendants' qualified immunity under *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982). Under *Harlow,* the critical inquiry is whether, "at the time Brick inspected the documents and transported them to Washington, D.C.," his conduct violated a clearly established constitutional right (Pet. App. 21a). "The answer must be 'No,' " the court concluded, "when, nine

years later, in 1976, five members of this court thought it manifest that the Senate defendants' investigative activity remained wholly within the law" (*id.* at 21a-22a; see page 5, *supra*).

Finally, the court of appeals reversed the privacy judgments against McClellan and Adlerman, but affirmed the award against Brick (Pet. App. 36a-53a). The court upheld the award against Brick on the ground that his conduct in requiring Alan McSurely to read his wife's correspondence in the copies of the documents that Brick returned to petitioners violated their right of privacy and his actions in this regard were not protected by the Speech or Debate Clause. There was no evidence, however, that Senator McClellan or Adlerman "ordered, directed, authorized, or otherwise approved the tortious manner in which" Brick returned the documents (*id.* at 51a).

ARGUMENT

The court of appeals' decision is correct (save for its affirmance of the privacy award against Brick), and it does not conflict with any decision of this Court or any other court of appeals. The judgment below does not rest on a single issue worthy of this Court's review. As the court of appeals concluded (Pet. App. 53a, 54a), the "curtain ought to be drawn" on this "ancient controversy."

1. Petitioners argue first (Pet. 18-36) that the court of appeals' "pronouncement" (Pet. 19) on the scope of the Speech or Debate Clause is erroneous. In making this argument, however, petitioners all but ignore the fact that speech or debate immunity was only one of two grounds, "each independently sufficient" (Pet. App. 26a), for the court's dismissal of their First Amendment claims, the other being the complete lack of evidence supporting petitioners' allegations. Because this Court "reviews judgments, not statements in opinions" (*Black* v. *Cutter Laboratories,* 351 U.S. 292, 297 (1956)), this case presents no occasion for the

Court to consider the immunity issue. In any event, each of the alternative bases for the court of appeals' holding is plainly correct.

a. Petitioners' brief (Pet. 35-36) attack on the court of appeals' conclusion that they did not produce evidence supporting their allegation that the Senate defendants conspired to violate their First Amendment rights must fail. Whether or not "the complaint alleged a conspiracy with Ratliff" (Pet. 35) is irrelevant: the "root problem" was that petitioners "set out on one track, then switched to another" (Pet. App. 32a). They sought to prove only "Senator McClellan's interest in pursuing a private feud with a newspaper columnist," which "was unrelated to the first amendment theory of their pleading" (*ibid.*). Petitioners do not explain how the mere facts that the original telephone call to a Subcommittee staff member (see page 2, *supra*) came from "an attorney who had represented Ratliff" (Pet. 35) and that some of the documents transported by Brick back to Washington were not relevant to the alleged feud (Pet. 36) could give rise to a supportable inference of a conspiracy to violate their First Amendment rights. Nor do they explain how the verdicts could be upheld in view of the absence of any clear jury instruction regarding this allegation (see Pet. App. 30a-32a). The factbound conclusion of the court of appeals, which had "the entire record at hand for close review" (*id.* at 32a), that petitioners simply had not proven their claims does not warrant review.

b. In any event, the court of appeals correctly stated that the Speech or Debate Clause would protect the Senate defendants "even if [petitioners] had proved the first amendment claims" set forth in their complaint (Pet. App. 32a). The essence of petitioners' First Amendment claims was that "the Subcommittee's investigation of them was not '*bona fide*' " because the purpose of the " 'investigation [was] to harass those whose views [were] at variance with

views of the members of the Senate Subcommittee' " (*id.* at 34a (quoting petitioners' complaint, C.A. App. 71)). Petitioners do not challenge the court of appeals' conclusions that the Subcommittee was in fact authorized to investigate the causes of civil disorder in general as well as petitioners' involvement in a 1967 riot and that, given the Subcommittee's apparently legitimate investigation, judicial inquiry into motive is impermissible (Pet. App. 33a, 34a). In stating this view of the Speech or Debate Clause, the court of appeals correctly followed this Court's precedents. See, *e.g.*, *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 508 (1975) ("Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it.").

Petitioners now argue (*e.g.*, Pet. 19, 23-24, 27-28) that Brick's inspection and transportation of the documents cannot be within the speech or debate immunity because it was not authorized by a congressional subpoena. But congressional investigations "plainly fall[]" within the " 'legitimate legislative sphere' " (*Eastland*, 421 U.S. at 503, 504). While issuance of subpoenas is "a legitimate use by Congress of its power to investigate" (*id.* at 504), that power is not limited to circumstances where subpoenas have been used. The inquiry under the Speech or Debate Clause is whether the challenged activity is sufficiently related to the legislative process to warrant immunity from executive and judicial interference. See, *e.g.*, *Doe* v. *McMillan*, 412 U.S. 306 (1973). That question cannot be answered in the negative merely by pointing to the absence of a subpoena.[7] Here,

---

[7]Petitioners' reliance (Pet. 24, 27) on *Gravel* v. *United States*, 408 U.S. 606 (1972), and *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967), is misplaced. In neither case did the Court hold that the presence or absence of a subpoena provided a talisman for determining whether the challenged activity was sufficiently connected to the legislative sphere to warrant immunity. See generally *Doe* v. *McMillan*, 412 U.S. at 309 n.2, 312-313 (extending immunity to collection of information that was obtained voluntarily pursuant to authorization for investigation).

there was no objective need for a subpoena, since it was not clear that Ratliff's consent to the inspection of the documents in his custody might be constitutionally ineffective (see Pet. App. 19a-26a). Accordingly, there is no basis for concluding that the failure to obtain a subpoena stripped the Senate defendants of their immunity by rendering Brick's actions outside "the outer perimeter of [his] line of duty" (*Barr* v. *Matteo*, 360 U.S. 564, 575 (1959) (plurality opinion)).

2. Petitioners' challenge (Pet. 36-52) to the court of appeals' ruling dismissing their Fourth Amendment claims is utterly meritless. Under the qualified immunity standard of *Harlow* v. *Fitzgerald, supra,* officials are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (457 U.S. at 818). It is difficult to imagine a more convincing demonstration that qualified immunity applies than the one provided by this case. Nine years after the Senate defendants' inspection and copying of the documents in Ratliff's custody, "five members of [the court of appeals] thought it manifest that the Senate defendants' investigative activity remained wholly within the law" (Pet. App. 21a-22a). Certainly the court of appeals was correct in holding that *Harlow* did not require the defendants to "be 'more perceptive of constitutional principles' than half the judges of th[e] circuit" (Pet. App. 25a). See *Mitchell* v. *Forsyth,* No. 84-335 (June 19, 1985), slip op. 22-23.

Petitioners respond by contending (Pet. 40-44) that the jury must have found as a factual matter that Brick was aware that he was violating the Fourth Amendment. Their quotation of the jury instructions, however, is taken out of context. In fact, the district court instructed the jury that the relevant "Fourth Amendment protections were clearly established" in 1967, and it placed on the defendants "the

burden of showing that by virtue of some extraordinary circumstances they were unaware of the clearly established Fourth Amendment protections" (C.A. App. 1713, 1716). In view of these instructions, it is wholly unreasonable to attribute to the jury a factual finding that the defendants knowingly violated a constitutional right that was not clearly established. Moreover, the court of appeals nowhere adopted (or even addressed) a rule immunizing under *Harlow* knowing violations of constitutional rights, which is the object of petitioners' attack.

Petitioners also contend (Pet. 44-52) that the disagreement reflected in the court of appeals' opinions on the interlocutory appeal in 1976 was factual rather than legal in nature. The court of appeals, which "had full knowledge of its own precedents" (*Davis* v. *Scherer*, No. 83-490 (June 28, 1984), slip op. 8 n.9), addressed this "desperate effort to preserve [petitioners'] fourth amendment jury verdicts" (Pet. App. 22a) at length and correctly disposed of it (*id.* at 22a-25a). As a simple reading of Judge Wilkey's dissenting opinion in 1976 will show, he and the four judges who joined the opinion reached a legal conclusion: " 'the inspection by one authorized government agent of documents in the custody of another can[not] be characterized as an unconstitutional search' " (*id.* at 21a (quoting 553 F.2d at 1318-1319)).

3. Finally, petitioners argue (Pet. 52-57) that the court of appeals erroneously reversed the common law privacy awards against McClellan and Adlerman. This factbound issue of state law plainly does not merit review by this Court. In any event, petitioners do not challenge the court of appeals' conclusion that McClellan and Adlerman could not be held vicariously liable for the manner in which Brick returned the documents to petitioners, which the court viewed as the "incident" on which the privacy claim "properly rests" (Pet. App. 37a). Rather, they contend that

McClellan and Adlerman should be liable for "condon[ing] and compound[ing]" Brick's initial inspection of the documents by "[telling] him to go back and search further" (Pet. 55). Even if, contrary to the conclusion reached by the court of appeals on its review of the record, petitioners could state a claim based on this theory, it would be barred by the Speech or Debate Clause, which protects the act of authorizing an investigation. See *Doe* v. *McMillan,* 412 U.S. at 313.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

BARBARA L. HERWIG
MARC JOHNSTON
Attorneys

OCTOBER 1985